No. 06-593

IN THE
SUPREME COURT OF THE UNITED STATES

LONG ISLAND CARE AT HOME, LTD., et al.,
Petitioners,

v.

EVELYN COKE,
Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Second Circuit

BRIEF *AMICI CURIAE* OF AARP AND THE OLDER WOMEN'S LEAGUE (OWL) IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 4

I. A Rapidly Growing Demand for Home Care Services Coupled with an Increasing Shortage of Home Care Workers Places America's Older and Disabled Persons in Peril 5

A. There is a strong and growing demand for home care 6

B. The country faces a severe and increasing shortage of home care workers due to inadequate pay for taxing work 8

i. Home care workers, who are predominately women supporting children, perform difficult yet vital jobs for low pay and limited or no benefits 8

ii. Low pay for this vulnerable population leads to low job satisfaction, poor retention rates, and diminished quality of care for older and disabled persons 9

II. Extending FLSA Protection to Home Care Workers Will Help Guarantee Older and Disabled Persons Proper Access and Care, and Is Therefore Consistent with Congressional Intent 10

A. Better working conditions, especially decent wages, are critical to ensure a supply of workers who can meet the demand for home care services and provide higher quality care 11

B. Providing workers like Ms. Coke with FLSA protection is consistent with the purposes of FLSA 14

CONCLUSION 15

TABLE OF AUTHORITIES

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Ball v. Biedess,
Civ. 00-0067-TUC-EHC (U.S.D.C. Ariz.) 2, 9

Chambers v. City and County of San Francisco,
C.A. C-06-06346 (N.D. Cal. filed
Oct. 15, 2006) 2

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527 U.S. 581 (1999) 2, 7

Skidmore v. Swift,
323 U.S. 134 (1944) 5

STATUTES

29 U.S.C. § 201-219 (2000) 4
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INTERESTS OF *AMICI CURIAE*[1/]

AARP is a nonpartisan nonprofit membership organization of more than thirty-eight million persons aged fifty and older dedicated to addressing the needs and interests of older Americans. Most older and disabled persons in need of long term care and/or supportive services prefer to receive these services in their own home. Mary Jo Gibson, *Beyond 50.03: A*

[1/] No counsel for any party authored any portion of this brief. No persons other than the *amici curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. Both parties have consented to the filing of all *amici curiae* briefs, in accordance with their general consent letters filed with this Court.

Report to the Nation on Independent Living and Disability, (AARP Public Policy Institute, April 2003). AARP thus has a substantial interest in securing quality home care for its members and others. AARP joined as *amici curiae* in the case of *Olmstead v. L.C.*, 527 U.S. 581 (1999), urging this Court to reach the decision it ultimately adopted - that unnecessary institutionalization amounts to discrimination under the American with Disabilities Act (ADA) and that states must create and implement comprehensive, effective working plans to serve persons in home and community-based settings rather than in institutions. AARP Foundation Litigation attorneys have subsequently been involved in litigation aimed at implementing the *Olmstead* decision. *See, e.g., Chambers v. City and County of S.F.*, C.A. C-06-06346 (N.D. Cal. filed Oct. 15, 2006) (advocating for the expansion of home and community-based care).

AARP is acutely aware of the shortage of home care workers and the need to improve the wages and benefits received by workers to help ensure their availability and a higher quality of care. To that end, AARP Foundation Litigation is co-counsel in *Ball v. Biedess*, Civ. 00-0067-TUC-EHC (U.S.D.C. Ariz.) (elderly and disabled in Medicaid Home and Community Based Services program forced to go without necessary care due to shortage of home health care workers caused in part by wages too low to recruit and retain sufficient numbers of home care workers).

The Older Women's League (OWL) is a national grassroots membership organization that focuses solely on issues unique to women as they age. OWL strives to improve the status and quality of life of midlife and older women. OWL is a nonprofit, nonpartisan organization that accomplishes its work through research, education, and advocacy activities conducted through a chapter network. Now in its twenty-third year, OWL provides a strong and effective voice for the more than fifty-eight million women age forty and over in America.

OWL's interest in this case stems from its longstanding interest in protecting the interests of the three core constituencies in long-term care: long term care recipients; their

family and friends; and home care workers, who provide paid services in communities. A majority of each of these groups is women. The plight of direct-care workers in particular is a serious concern of OWL's membership. Improving the working conditions for home care workers by extending the legal right to earn minimum wage and overtime pay without exception under the Fair Labor Standards Act has a direct and beneficial impact on women, particularly older women.

SUMMARY OF ARGUMENT

Home care workers, who are predominately women with children, are vital to America's long term care delivery system. Providing the vast majority of compensated face-to-face care to older persons and persons with disabilities, home care workers guarantee these individuals can maintain some degree of functionality and continue living in the privacy and comfort of their own homes. Paraprofessional Healthcare Institute, *Direct-Care Health Workers: The Unnecessary Crisis in Long-Term Care* (Jan. 2001), *available at* http://www.directcareclearinghouse.org/download/Aspen.pdf (hereinafter Paraprofessional Healthcare); Robyn I. Stone & Joshua M. Wiener, *Who Will Care for Us? Addressing the Long-Term Care Workforce Crisis* (Oct. 2001).

Although performing critically important functions, home care workers receive low pay and minimal or no benefits. Such working conditions have led to high turnover rates and acute shortages of home care workers across the country. *See* Center for California Health Workforce Studies, *An Aging U.S. Population and the Health Care Workforce: Factors Affecting the Need for Geriatric Care Workers* (Feb. 2006) (hereinafter California Health). The shortage of these workers will only intensify as the American population ages and the demand for home care significantly increases. More and more, older and disabled persons are expressing a preference for home-based care. Paraprofessional Healthcare, *supra*. Yet the continued exclusion from coverage by the Federal Labor Standards Act (FLSA) of home care workers who are employees of third parties will only perpetuate the shortage of these workers, widening the already existing gap between supply and demand.

The exclusion is inconsistent with the purposes of the FLSA, which sought to provide workers with needed protection *and* ensure an adequate supply of domestic workers.

Based on extensive experience with federal and state programs that finance much of the provision of home care services through third party agencies, and based on the understanding that better pay for home care workers equates with better care for home care clients, *Amici* believe that exempting third party agencies of the minimum requirements of the FLSA does not serve, but rather compromises the interests of both older and disabled persons. This Court should affirm the Second Circuit's decision that home care workers are clearly part of the workforce entitled to coverage under the FLSA and recognize the rights of these critically needed employees and the needs of America's long term care consumers.

ARGUMENT

In 1974, Congress passed a series of amendments to the FLSA, 29 U.S.C. § 201, originally enacted in 1938. *See* Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55 (codified at 29 U.S.C. 201-219 (2000)). These amendments extended FLSA's minimum wage, overtime pay, and other protections to domestic employees; however, they provided an exemption for any employee employed in "domestic service employment to provide companionship services." 29 U.S.C. § 213(a)(15). The Department of Labor ("DOL" or "Department") subsequently defined "domestic service employment" as "services of a household nature performed by an employee in or about a private home . . . *of the person by whom he or she is employed*," thereby only exempting employees employed by the home's owner or resident. Domestic Service Employment, 29 C.F.R. § 552.3 (2007) (emphasis added). However, in another regulation, the DOL provided that "[e]mployees who are engaged in providing companionship services . . . and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements." Third Party Employment, 29

C.F.R. § 552.109(a). This second regulation, the third-party regulation, amounts to a broadening of the exemption and a stretching of congressional intent beyond natural bounds.

Supporting the current rule, Petitioners argue that the economic impact that would result if workers were not exempt from FLSA's minimum wage and overtime pay requirements would cause severe disruptions for clients needing care. *See* Brief for Petitioners, *Long Island Care at Home, Ltd., et al. v. Coke*, No. 03-7666, at 43-44 (U.S., May 29, 2005). However, *Amici* believe the opposite: that *failing* to extend FLSA protection will result in severe disruptions in care. *Amici* support the decision of the Second Circuit, believe the court properly afforded the third-party regulation *Skidmore* deference, not *Chevron* deference, and urge this Court to affirm, thereby ensuring a higher quality of care and continuity of care for America's older and disabled persons in need of home health services. *See generally Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift*, 323 U.S. 134 (1944).

I. A Rapidly Growing Demand for Home Care Services Coupled with an Increasing Shortage of Home Care Workers Places America's Older and Disabled Persons in Peril.

In 2000, thirteen million Americans received some form of long term care, the bulk of which was provided by direct care workers. Dep'ts of Health and Human Servs. & Labor, *The Future Supply of Long-Term Care Workers in Relation to the Aging Baby Boom Generation, Report to Congress* (May 2003) (hereinafter *Future Supply*); *see also* Paraprofessional Healthcare, *supra*. Direct care workers are paraprofessionals who carry a variety of job titles, including personal care assistants, home care workers, home health aides, and certified nursing assistants (CNAs). They work in a variety of settings, including private homes, adult day centers, assisted living residences, and nursing homes. Bernadette Wright, *Direct Care Workers in Long Term Care (*AARP Public Policy Institute, May 2005). There are more than a million direct care workers in the United States whose jobs include assisting with

personal care activities, providing oversight for people with cognitive and mental impairments, observing and reporting changes in a client's condition, administering medications and measuring vital signs, preparing meals and housekeeping, and providing comfort and companionship. *Id.* Providing the vast majority of face-to-face contact with long term care patients, direct care workers are considered the lifeblood of the long-term care industry. Paraprofessional Healthcare, *supra.*

Although direct care workers constitute the primary providers of long term care today, almost every state in the country reports a critical shortage of direct care workers. *Id.* This shortage of workers in the face of strong and increasing demand has created a "care gap," leaving many older and disabled clients with inadequate or even no source of care. *Id.* Furthermore, from 2000 to 2050, the total number of individuals in need of long term care services will increase by over 100%, from thirteen million to twenty-seven million, with the vast majority of individuals preferring home care to institutional care; however, the traditional care giving population - women age twenty to fifty-four - is projected to increase by just nine percent during this time. *Future Supply, supra.* Such disparities in growth will only widen the "care gap," compromising the health and safety of older and disabled persons.

A. There is a strong and growing demand for home care.

Due to a convergence of factors, there is a growing demand for home care services. First, the public increasingly reports a preference for home-based care over institutionalized care. Paraprofessional Healthcare, *supra.* This preference is evidenced by the fact that although the population in need of long term care services is growing, nursing home bed growth has slowed. Charlene Harrington et al., *Trends in the Supply of Long-Term-Care Facilities and Beds in the United States*, 24 No. 4 Journal of Applied Gerontology 265 (Aug. 2005). From 1990 to 2002, the number of nursing home beds declined from 66.7 per 10,000 to 61.4 per 10,000 people. *Id.* In response to consumer preferences, there has been an ongoing shift in long

term care financing away from institutional care. Paraprofessional Healthcare, *supra*. Congress sought such an end in passing the ADA, and this Court in *Olmstead v. L.C.* affirmed the illegality of unnecessary institutionalization. 527 U.S. 581 (1999). *Olmstead* and subsequent cases have moved state Medicaid programs away from a bias in favor of nursing home care and toward more home and community-based care. Sara Rosenbaum & Joel Teitelbaum, *Olmstead at Five: Assessing the Impact*, Kaiser Family Foundation (2004), *available at* http://www.kff.org/medicaid/upload/Olmstead-at-Five-Assessing-the-Impact.pdf. Consequently the need for home care workers has expanded.

Second, with the aging of the U.S. population and increases in life expectancy, the forecast for the home care industry is one of unprecedented growth. *See* California Health, *supra*. As the Baby Boom generation begins to turn sixty-five in 2011, the percentage of the population in need of long term care services will rapidly increase. U.S. Census Bureau, *65+ in the United States: 2005* (Dec. 2005). The older population is projected to double from thirty-six million in 2003 to seventy-two million in 2030, an increase from twelve to twenty percent of the population as a whole. *Id.* In that time, the U.S. population aged eighty-five and older - those most likely to need home care services - is projected to increase from 4.3 million to 8.9 million. *Nursing Workforce: Recruitment and Retention of Nurses and Nurse Aides Is a Growing Concern*, Testimony Before the S. Comm. on Health, Education, Labor and Pensions, 107th Cong. (2001) (statement of William J. Scanlon, Director, Health Care Issues, General Accounting Office), *available at* http://www.gao.gov/new.items/d01750t.pdf. To meet this need, the number of available direct care jobs will increase at a much higher rate than employment in the overall labor market between 2002 and 2012. Wright, *supra; see also Occupational Outlook Handbook*; D.E. Hecker, *Occupational Employment Projections to 2012*, Monthly Labor Review (Feb. 2004); Nat'l Clearinghouse on the Direct Care Workforce, *Who Are Direct Care Workers?*, Fact sheet (Sept. 2004).

B. The country faces a severe and increasing shortage of home care workers due to inadequate pay for taxing work.

In all geographic regions of this country, there is an ongoing shortage of home care workers needed to meet the demand for home care services. *See* Health Res. and Servs. Admin., *Nursing Aides, Home Health Aides, and Related Health Care Occupations: National and Local Workforce Shortages and Associated Data Needs*, Dep't of Health and Human Servs. 14 (Feb. 2004) (hereinafter Health Res. and Services Admin.); *see also* Dorie Seavey & Vera Salter, *Paying for Quality Care: State and Local Strategies for Improving Wages and Benefits for Personal Care Assistants* (AARP Policy Institute, Oct. 2006). The undersupply of home care workers is consistently attributed to inadequate wages and benefits, and the shortage of workers leads to both reductions in quality of care and disruption in access to care for older and disabled persons. *See, e.g.*, Paraprofessional Healthcare, *supra*.

i. Home care workers, who are predominately women supporting children, perform difficult yet vital jobs for low pay and limited or no benefits.

In comparison to the general workforce, home care workers are more likely to be women, non-white, and unmarried with children. Wright, *supra*. The typical home care worker is a single mother between the age of twenty-five and fifty-four, economically disadvantaged, with low levels of educational attainment. Stone & Wiener, *supra*. Most choose direct care work because they want to help people and are interested in working in health care. Wright, *supra*. Unfortunately, home care workers typically receive very low pay for their work. *Id.* In fact, they are among the lowest paid workers in the U.S. service industry. Stone & Wiener, *supra*. Thus, annual wages for full-time work range from $16,750 to $20,760. Wright, *supra*. Yet, because many home care aides work less than full time, the median annual income for the profession was $12,300 in 2001. California Health, *supra*. As

a result, almost one-third of these workers return from work to a family living in poverty. Paraprofessional Healthcare, *supra*.

Beyond low pay, home care workers often have no benefits, high workloads, unsafe working conditions, inadequate training, lack of respect from supervisors, lack of control over their jobs, and few opportunities for advancement. Wright, *supra*. The occupational group "Nursing Aides, Orderlies, and Attendants," which includes home health aides, had the second-highest number of work-related injuries and illnesses among all occupational groups in 2002 due to the strenuous work of lifting and moving patients; yet approximately forty percent of these employees have no health insurance. California Health, *supra*.

ii. Low pay for this vulnerable population leads to low job satisfaction, poor retention rates, and diminished quality of care for older and disabled persons.

The consequences of chronic low pay for home care workers are well known. Home care workers report low job satisfaction, and the industry suffers from high turnover rates. *See, e.g.* Robyn I. Stone, *The Direct Care Worker: The Third Rail of Home Care Policy,* 25 Annu. Rev. Public Health 521 (2004). Turnover rates in home care average twelve to sixty percent on an annual basis. Health Res. and Services Admin., *supra*. However, one report, compiling research studies of individual home health providers, noted that turnover rates for home care employers ranged from forty to 166 percent. Better Jobs Better Care, *The Cost of Frontline Turnover in Long-Term Care* (Oct. 2004) (hereinafter Better Jobs). These extremely high turnover rates produce a host of negative effects for clients.

Workforce instability leads to inadequate, unsafe care as well as service delivery disruptions and failures, endangering older and disabled persons' ability to remain in their homes. *See* Order of August 13, 2004, *Ball v. Biedess*, Civ. 00-0067-TUC-EHC (U.S.D.C. Ariz.), *appeal pending, Ball v. Rogers*, No. 04-169 (9th Cir. docketed Oct. 5, 2004) (failure of services

to meet the needs of elderly and disabled Medicaid beneficiaries caused by inadequate wages of home care workers). High turnover rates in the profession lead to a dearth of workers with extensive, hands-on experience in providing care, thereby lowering the quality of care clients receive in their homes. *See* Paraprofessional Healthcare, *supra*. Furthermore, lacking continuity with their home care aides, many older and disabled persons fail to build trusting relationships with their providers and are forced to continually instruct the new workers as to the specific care they need. *See* California Health, *supra*. This causes mental strain in addition to the physical ailments many are already battling. *See id.*

II. Extending FLSA Protection to Home Care Workers Will Help Guarantee Older and Disabled Persons Proper Access and Care, and is Therefore Consistent with Congressional Intent.

The gap between the supply of and demand for home care and other direct care workers will increase in the upcoming years. Nora Super, *Who Will Be There to Care? The Growing Gap between Caregiver Supply and Demand* (2002). Recognizing that this "care gap" will continue to expand until the quality of direct care jobs improves, numerous states, localities, and advocates have employed various strategies to bolster the wage rates and benefits for direct care workers delivering services paid for by Medicaid. Paraprofessional Healthcare, *supra*; Seavey & Salter, *supra*. These strategies include wage pass through legislation,[2/] living wage ordinances,[3/] minimum wage improvements,[4/] and litigation against state Medicaid agencies. While some of these strategies

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[2/] Legislation that earmarks appropriations to go directly to specific groups of workers. Seavey & Salter, *supra* note 11, at ii.

[3/] Sets a wage floor for a specific group of workers; generally requiring wages needed to support a family at a level above the poverty line. Seavey & Salter, *supra* note 11, at iii.

[4/] Establishes a wage floor for all businesses and workers in a given city, state, or country. Seavey & Salter, *supra* note 11, at iii.

have been helpful in individual states, these efforts are not enough.

The lack of FLSA protection reduces the quality of home care workers' jobs and consequently impairs the quality of care provided to home care clients. *See* Paraprofessional Healthcare, *supra* ("Health care researchers have long noted the connection between the quality of direct care jobs and the quality of care received by clients."). Congress' intent in enacting the 1974 FLSA amendments was to promote fair working conditions for domestic workers and thereby ensure an adequate supply of domestic workers, including those providing home care for older persons, but these salutary effects will not be felt by home care workers or their clients if the workers continue to be deprived of the Act's protections.

A. Better working conditions, especially decent wages, are critical to ensure a supply of workers who can meet the demand for home care services and provide higher quality care.

To guarantee a sufficient and qualified workforce of home care aides, the quality of these jobs must be improved. Providing a living wage will attract more workers as well as increase job satisfaction and retention for those already providing care. *See generally* H. Stephen Kaye et al., *The Personal Assistance Workforce: Trends in Supply and Demand*, 25 No. 4 Health Affairs 1113 (2006). For example, a study conducted in San Francisco County, California found that almost doubling the wage rate for independent home health workers in the county between November 1997 and February 2002 yielded a fifty-four percent increase in the number of workers and a seventeen percent decrease in the number of workers leaving the job within their first year of employment.[5/] Stone, *supra*.

[5/] Just as the author notes, *amici* also recognize that other factors such as changes in the Welfare-to-Work requirements could have accounted for some of the increase in worker supply and decrease in job turnover. *See* Stone, *supra*.

Contrary to Petitioner's contentions and the assertions of *amici* supporting Petitioner, extending FLSA protection to home care workers will not jeopardize the businesses of third party employers or "almost certainly cause severe disruptions for clients needing care." Petition for Writ of Certiorari, *Long Island Care at Home, Ltd., et al. v. Coke*, No. 03-7666, at 15 (U.S. May 29, 2005); *see also* Brief for New York and New York State Associations of Counties as *Amici Curiae* Supporting Petitioner, *Long Island Care at Home, Ltd., et al. v. Coke*, No. 03-7666 (U.S., May 29, 2005). While some third party employers already operating with small profit margins may struggle to provide their employees with overtime pay - which would be required if third party employers of home health workers are no longer exempt - there is no evidence that this would be the rule rather than the exception. In fact, the U.S. Department of Labor reports "home health aides" to be the fastest growing occupation in the country from 2004-2014, and home health care is deemed to be burgeoning industry. Bureau of Labor Statistics, *Fastest Growing Occupations*, 2004-14, U.S. Department of Labor, *available at* http://www.bls.gov/emp/emptab21.htm; *see also* Inc.com, *Top 10 Industries to Start and Grow a Business*, Apr. 2005, *available at* http://www.inc.com/articles/2005/04/top_10 (names home health care as number six on top ten list of industries that "hold the most promise for savvy entrepreneurs over the next 10 years").

Furthermore, Petitioner and its *amici* fail to consider that at least some of the costs associated with increased wages will be offset by savings from reduced turnover.[9] *See* Paraprofessional Healthcare, *supra*. High turnover often leads

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[9] Petitioner's *amici* make several broad, doomsday-like statements regarding the consequences of extending FLSA protection to home care workers but provide almost no authority for such assertions. *Amici* cite three "additional annual costs" that will be incurred, the largest of which ($168 million) is attributed to billable and overtime hours for 24-hour daily care provided by "sleep-in" home attendants. Sleep-in home attendants fall under a separate exemption, 29 U.S.C. § 213(b)(21), so those costs should not have been attributed to *amici's* cost projections. *See* City of New York, et al. Amici Br. at 23.

to high recruitment and orientation costs, high retention costs, high separation costs, high temporary replacement costs, and foregone sales revenue. *Id.* Although estimates for these costs vary, they are significant. *See, e.g.*, Better Jobs (applying a "rule-of-thumb," which holds that the comprehensive cost of replacing a worker is twenty-five percent of his or her annual compensation, and estimating that the average turnover cost for a direct care worker is in the range of $4,200 to $5,200). A 1998 study by the Governor's Council on Disabilities and Special Education in Alaska estimated the average statewide cost of turnover per direct service provider to be $2,341, and a Massachusetts agency that employs nearly 2,000 direct care workers estimated their replacement costs to be approximately $5,276 per worker. *Id.* Increasing wages for home care aides can alleviate both recruitment and retention costs for providers. *See, e.g.*, Leon, J et al., *Pennsylvania's Frontline Workers in Long-Term Care: The Provider Organization Perspective*, Polisher Research Institute (Feb. 2001).

Most importantly, increasing pay for home care workers will result in better care for older persons and persons with disabilities. The Institute of Medicine has noted the connection between working conditions for care-giving personnel and the quality of care clients receive, recommending that "[f]ederal and state governments, as appropriate, should undertake - for all long-term-care workers and for all settings-measures to improve work environments including competitive wages, career development opportunities, work rules, job design, and supervision that will attract and retain a capable, committed work force," thereby helping to ensure proper care for the those in need of long term care services. Institute of Medicine, *Improving the Quality of Long-Term Care, Summary* (Jan. 2001) *available at* http://www.iom.edu/Object.File/Master/4/136/LTC8pagerFINAL.pdf. Because providing higher pay and offering better employment benefits yields improved recruitment and retention, extending FLSA protections to home care workers will result in lower turnover costs for providers and better care for clients.

B. Providing Workers like Ms. Coke with FLSA Protection is Consistent with the Purposes of FLSA.

The DOL Memorandum states that one of the purposes of the 1974 FLSA amendments was to assure that working families could find home care for older and disabled persons in their households. Wage and Hour Advisory Memorandum No. 2005-1, from Alfred B. Robinson, Deputy Administrator, Dep't of Labor to Regional Administrators, District Directors (Dec. 1, 2005). Even in 1973, Congress was concerned with the growing gap between supply and demand for services in the home.

> It is important to note . . . the demand for household workers is not being met. Bringing domestics under the Fair Labor Standards Act would not only assure them a minimum wage but would enhance their status in the community. It is expected that the supply of domestic workers will increase as their pay and working conditions improve. Minimum wages should serve to attract skilled workers to these jobs at a time when the need for skilled domestic employees is greatly increasing. S. Rep. No. 93-300, 93d Cong., 1st Sess. (July 6, 1973).

The exclusion of direct care workers employed by third parties from the FLSA's protections is only helping to perpetuate the already existing shortage of these workers.

Furthermore, when Congress enacted the companionship exemption, Congress intended to exempt only casual sitters for older persons or children. *See* Molly Biklen, Note, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act*, 35 Colum. Hum. Rts. L. Rev., 113 at 123-125; 119 Cong. Rec. 24801 (daily ed. July 19, 1973) (statement of Sen. Williams) (describing a babysitter's job as "to watch the youngsters," and the companion's job as "the same role - to be

there and to watch an older person."). As noted by the Second Circuit, the DOL has recognized in recent years that home care aides perform a much greater variety of tasks in the home and that the current domestic service regulations "exempt types of employees far beyond those whom Congress intended to exempt when it enacted section 213(a)(15)." *Coke*, 376 F.3d at 125 (2d Cir. 2004) (Application of Fair Labor Standards Act to Domestic Service, 66 Fed. Reg. 5481, 5482, proposed Jan. 19, 2001).

Congress did not intend to exempt paraprofessional home care workers like Ms. Coke, employed by third party agencies like Long Island Care at Home, from the basic FLSA protections. FLSA protections should be extended to home care workers serving clients in their homes, as such protections will strengthen the home care workforce and result in higher quality of care and continuity of care for America's older and disabled persons.

CONCLUSION

For the foregoing reasons, *Amici Curiae* urge the Court to affirm the Second Circuit's decision below.

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